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# State v. Ish Respondent's Brief Dckt. 39847

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MARTIN EDMO ISH,

Defendant-Appellant.

No. 39847

Bannock Co. Case No.  
CR-2011-561

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BANNOCK

HONORABLE STEPHEN S. DUNN  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

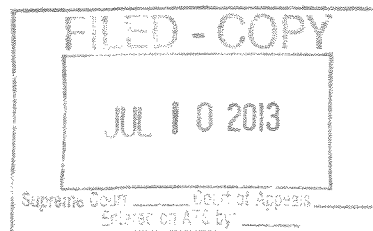
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## STATEMENT OF THE CASE

### Nature of the Case

Martin Edmo Ish appeals from his judgment of conviction and sentence entered following a jury verdict of guilty for possession of a controlled substance. Specifically, he challenges the sufficiency of the evidence presented by the state to sustain a persistent violator verdict and asserts the district court abused its sentencing discretion.

### Statement of the Facts and Course of the Proceedings

Law enforcement stopped the vehicle Ish was driving for an expired registration violation. (PSI, p.2.) Ish smelled of alcohol and failed field sobriety tests. (Id.) Upon his arrest, Ish was found to be in possession of a three-inch straw that he used to “snort crushed hydrocodone.” (Id.) The substance in the snort tube was tested and determined to be methamphetamine. (PSI, pp.2-3.)

The state charged Ish with possession of a controlled substance (R., pp.37-38) and with a sentencing enhancement for being a persistent violator (R., pp.39-40). The matter proceeded to trial where the jury found Ish guilty of possession of a controlled substance (R., p.191; JT Tr., p.257, L.25 – p.258, L.7) and of being a persistent violator of the law (R., p.192; JT Tr., p.267, Ls.6-23).

The court sentenced Ish to a 12-year unified sentence with the first four years fixed followed by eight years indeterminate. (R., pp.227-231; 2/13/12 Tr., p.101, Ls.10-11.) Ish timely appealed. (R., pp.239-242.)

## ISSUES

Ish states the issues on appeal as:

1. Was the evidence sufficient to support the persistent violator finding?
2. Did the district court abuse its discretion when it imposed a unified sentence of twelve years, with four years fixed, upon Mr. Ish following his conviction for possession of a controlled substance (methamphetamine) as a persistent violator?

(Appellant's brief, p.3.)

The state rephrases the issues as:

1. Was there substantial competent evidence to support the jury's verdict finding Ish a persistent violator?
2. Has Ish failed to establish that the district court abused its discretion by imposing a 12-year unified sentence with the first four years fixed where Ish is a persistent violator?

## ARGUMENT

### I.

#### There Was Substantial Competent Evidence From Which The Jury Could Conclude Ish Was A Persistent Violator Of The Law

##### A. Introduction

Ish asserts there was insufficient evidence presented to support the jury's verdict finding him guilty of being a persistent violator. (Appellant's brief, pp.4-5.) Specifically, Ish contends the "evidence tying him to [the second conviction] was insufficient as a matter of law to support a persistent violator finding." (Appellant's brief, p.4.) Ish is incorrect.

##### B. Standard Of Review

"Appellate review of the sufficiency of evidence is limited in scope." State v. Marsh, 153 Idaho 360, 365, 283 P.3d 107, 112 (Ct. App. 2011). An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d

at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Support The Jury Verdict Finding Ish Guilty Of Being A Persistent Violator

Ish was convicted of the persistent violator enhancement for prior convictions for possession of methamphetamine and three counts of burglary. (R., pp.39-40; State's Exhibits 6, 7 (4-19/13 Augmentation).) On appeal, Ish does not challenge the adequacy of the evidence supporting the finding of the prior possession conviction, but contends the evidence showing the prior burglary convictions is "insufficient as a matter of law to support a persistent violator finding" because it "only contained the same first and last names as Mr. Ish." (Appellant's brief, p.4.) Application of the relevant law to the record shows Ish's claim is without merit.

The Idaho Court of Appeals has held that a federal judgment from another state, standing alone, is not sufficient to support a persistent violator holding. See State v. Martinez, 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct. App. 1982). In Martinez, the state sought to prove Martinez's persistent violator status through the introduction of a prior Idaho state conviction in addition to a prior out-of-state federal conviction and testimony regarding fingerprint comparisons. (Id.) Although the court noted that a copy of the federal judgment out of California standing alone would be insufficient to support the persistent violator verdict,



mug shots and a positive fingerprint analysis could, and did, establish “the defendant Martinez as the person convicted of the federal offense.” (Id.)

In State v. Medrain, 143 Idaho 329, 144 P.3d 34 (Ct. App. 2006), the Court of Appeals found the evidence presented that Medrain “bore the same name as the person referred to in the [prior] judgments of conviction ..., with nothing more, was legally insufficient” to support a persistent violator verdict. Medrain, 143 Idaho at 332-33, 144 P.3d at 37-38.

However, in State v. Lawyer, 150 Idaho 170, 244 P.3d 1256 (Ct. App. 2011), the court considered what type of evidence in addition to the traditionally accepted identification evidence was sufficient to allow a trier of fact to identify a defendant as having been the same person implicated in a prior conviction. Personally identifying evidence includes fingerprints, pictures, testimony of law enforcement or court officials identifying the defendant as the subject of the prior conviction, admission of culpability in prior convictions, and evidence establishing identical driver’s license number, sex, race, and date of birth. Lawyer, 150 Idaho at 173-74, 244 P.3d at 1259-60. Nonpersonal evidence as considered by other jurisdictions includes similar character of offenses as well as convictions occurring in the same jurisdictions. Lawyer, 150 Idaho at 174, 244 P.3d at 1260. The Court of Appeals considered the presentation of personal identity evidence in addition to nonpersonal evidence of identity such as the “same crime committed in the same county” and found “a combination of personal and nonpersonally identifying evidence, when considered together, may at some

point be sufficient to establish identity beyond a reasonable doubt.” Lawyer, 150 Idaho at 174, 244 P.3d at 1260.

The Idaho Supreme Court’s recent opinion in State v. Parton, 154 Idaho 558, 300 P.3d 1046 (2013), is instructive. In Parton, the defendant argued “that, as a matter of law, the same name and same date of birth are not sufficient to prove that Defendant was the person convicted in the [prior] judgment.” Parton, 154 Idaho at \_\_\_\_, 300 P.3d at 1057. After noting the legal standards applicable to sufficiency of the evidence claims, the Court rejected Parton’s argument, explaining:

The [prior] judgment was admitted without objection. The name of the defendant on the judgment was “DARIN WILLIAM PARTON” and his date of birth was [REDACTED] which are identical to Defendant’s full name and date of birth. No contradictory evidence was presented, nor was there any argument that Defendant had a common name. The jury was not required to reach its verdict beyond any possible doubt. It was only required to conclude, beyond a reasonable doubt, that the Darin William Parton named in the [prior] judgment was the same Darin William Parton on trial in this case. The jury’s verdict finding that it was is supported by substantial evidence.

Parton, 154 Idaho at \_\_\_\_, 300 P.3d at 1057-58.

Here, Ish asserts Exhibit 7, containing only “the same first and last names as Mr. Ish” is “insufficient as a matter of law to support a persistent violator finding.” (Appellant’s brief, p.4.) The evidence offered by the state in this case, however, is not so limited.

In support of its allegation that Ish is a persistent violator, the state offered two certified judgments of conviction, identified as State’s Exhibits 6 and 7. (Exhibits 6 and 7, 4/19/13 Augmentation.) Based on this evidence, the jury

convicted Ish of being a persistent violator. (R., p.192.) Exhibit 7, which was offered and admitted, without objection, as a self-authenticating document indicates the defendant, "MARTIN ISH," pled guilty to two counts of burglary in the first degree. (Exhibit 7, 4/19/13 Augmentation.) Consistent with this identifying information, the arresting officer in Ish's current case testified as to Ish's name. (JT Tr., p.261, Ls.20-25.) Exhibit 7 was admitted without objection, containing the same first and last name as Martin Ish. All three convictions were out of Bannock County. There was no evidence presented to contradict the legitimacy of the prior conviction, nor was there any argument that Ish had a common name. Exhibit 7, in addition to reflecting Martin Ish's name, also came from the same county as Ish's current conviction and the conviction established by Exhibit 6. While the state did not offer the types of evidence previously included in considering the sufficiency of evidence in other cases involving a challenge to a persistent violator enhancement, such as fingerprints, mug shots, and a social security number, this does not mean the evidence submitted in this case was insufficient. Additionally, Ish's date of birth, [REDACTED] also correlated with his 1975 conviction while he was a "minor" (under 21). (Compare JT Tr., p.263, Ls.10-12 with Exhibit 7, 4/19/13 Augmentation, pp.1 (dated judgment), 4 (Ish was a minor).) The number of people who were under the age of 21 named "Martin Ish" found in Bannock County in 1975 has to be very limited.

Evidence that a felony judgment was previously entered against an individual with the same name, of the same general age, coming from the same county as Ish was sufficient for the jury to conclude, beyond a reasonable doubt,

that Ish was the same person formerly convicted pursuant to the judgment admitted as Exhibit 7.

Ish has failed to establish the state presented insufficient evidence to support the jury's conclusion that he is a persistent violator.

## II.

### Ish Has Failed To Establish An Abuse Of The Sentencing Court's Discretion

#### A. Introduction

Ish asserts on appeal that the district court abused its discretion in imposing a 12-year unified sentence in light of the *de minimis* nature of the offense he was convicted of. (Appellant's brief, p.6.) Ish has failed to meet his burden of establishing the excessiveness of his sentence and has thereby failed to establish that the district court abused its discretion.

#### B. Standard Of Review

When a defendant alleges an excessive sentence on appeal, the appellate court independently reviews "all of the facts and circumstances of the case" and considers the nature of the offense and the character of the offender. State v. Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. Cope, 142 Idaho at 500, 129 P.3d at 1249. Those objectives are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing."

State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). The fixed portion of the sentence is considered the probable duration of confinement. State v. Sanchez, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). A sentence that does not exceed the statutory maximum will not be disturbed on appeal absent a clear abuse of discretion. State v. Reinke, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where reasonable minds might differ as to the length of sentence, the appellate court will not substitute its view for that of the sentencing court. State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

C. Ish Has Failed To Establish That The District Court Abused Its Discretion In Sentencing

On appeal, Ish asserts that “in light of the mitigating circumstances present, most importantly the *de minimis* nature of the offense, the district court abused its discretion when it imposed a unified sentence of twelve years, with four years fixed[.]” (Appellant’s brief, p.6.) To establish that his sentence is excessive, Ish must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and punishment or retribution. In this case, the district court noted in sentencing that although Ish had not had a felony conviction since 2003, he had lived far from a law-abiding life in that time:

... your attorney is emphasizing your felony history and the fact that you haven’t had a felony since 2003. Frankly, I don’t think that’s that long ago, but even taking that into account, the reality is that since 2003 that felony – I didn’t count them, but I will, there have been 14 misdemeanors.

So to imply today that since you got out of prison on your last felony you have been a law-abiding citizen would be completely contrary to that record. The fact of the matter is that you have continued to engage in criminal behavior which has for one reason or another beyond my control resulted in numerous misdemeanor convictions although no additional felonies have been charged.

(2/13/12 Tr., p.99, Ls.2-15.) The court also took into consideration the fact that Ish had continued “blaming law enforcement for [his] charges.” (2/13/12 Tr., p.100, Ls.3-4.)

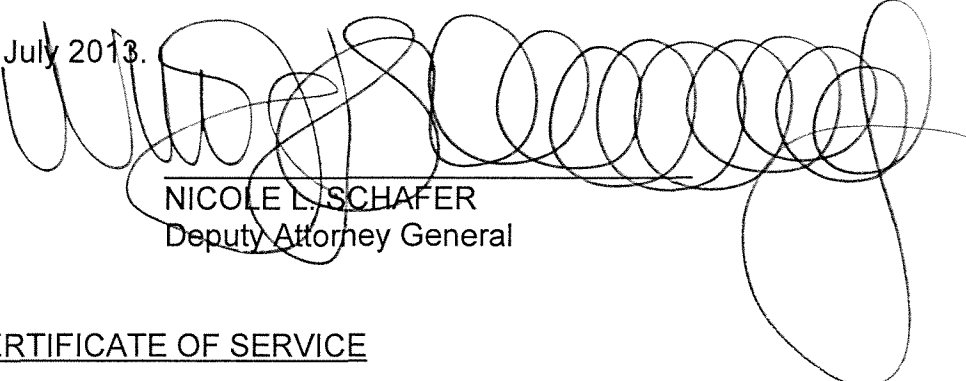
Ish argues on appeal the court should have considered the *de minimis* nature of the offense he was convicted of, claiming that his conviction for the possession of a “snort straw containing methamphetamine residue” was “akin to possession of paraphernalia.” (Appellant’s brief, p.7.) Ish cites to no authority for the position that “the *de minimis* nature of [an] offense” (Appellant’s brief, p.7) requires a lesser sentence that completely overlooks his ongoing pattern of drug use and law violations. As the court noted in sentencing, “despite ongoing substance abuse problems for many years,” Ish described his drug use as “recreational” and “simply could care less whether or not [he was] engaging in criminal behavior.” (2/13/12 Tr., p.100, Ls.6-12.)

The district court’s unified sentence of 12 years with four years fixed for Ish’s conviction for possession of a controlled substance with a persistent violator enhancement is entirely reasonable in light of the nature of the crime, Ish’s significant criminal record, and his continued failure to take responsibility for his criminal actions. Ish has failed to show that the district court abused its sentencing discretion.

CONCLUSION

The state respectfully requests this Court to uphold Ish's judgment of conviction and sentence.

Dated this 10<sup>th</sup> day of July 2013.



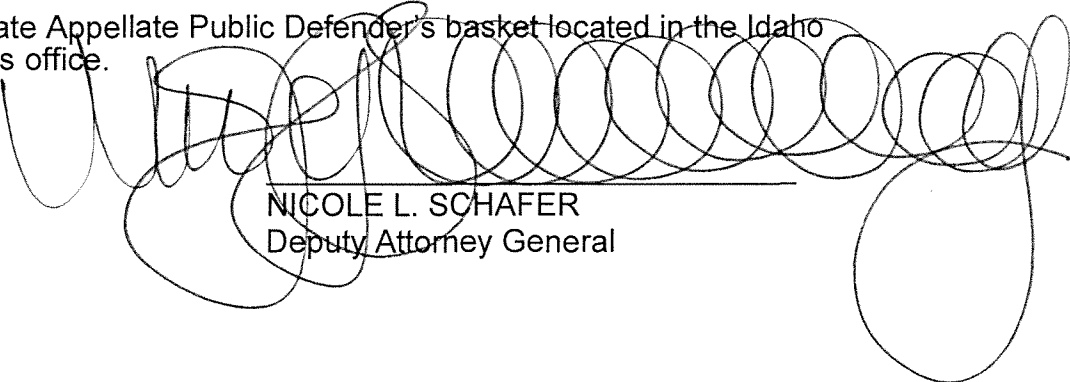
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10<sup>th</sup> day of JULY 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm